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IN THE

Supreme Court of the United States

October Term, 1962

No. 711

NATIONAL BULK CARRIERS, INC., In personam,
and the SS BULKCRUDE, In rem,

Petitioners,

v.

MRS. VALERIE JEAN GARDNER, As Administratrix of the Estate of Robert Edward Gardner, Jr., Deceased,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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National Bulk Carriers, Inc., et al, petitioners, pray that this Court grant rehearing of its order of February 18, 1963, denying their petition for certiorari, and that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit in the above entitled case as prayed for in the petition filed January 2, 1963, herein.

Reasons For Granting Rehearing And Issuing The Writ

In the light of the decision of this Court in *Gallick v. Baltimore & Ohio Railroad Co.,* decided February 18, 1963, (unreported so far as petitioners are advised except in the issue dated February 19, 1963, of The United States LAW WEEK p. 4182) petitioners submit that the decision of the Fourth Circuit in this case has improperly invaded the functions of the trier of the facts in this Jones Act case.

Fully cognizant of the small percentage of petitions for rehearing granted, petitioners file this petition with the firm conviction that in view of the expressions of this Court in *Gallick v. Baltimore & Ohio Railroad Co.,* supra, not decided when petitioners' petition for a writ of certiorari was filed, the functions of the trier of the facts in the instant case have been improperly invaded and completely overthrown by the Circuit Court of Appeals for the Fourth Circuit.

The administratrix of Gardner's estate elected to bring this action on the admiralty side of the United States District Court for the Eastern District of Virginia, at Norfolk, thereby waiving the right to a jury trial available had it been brought on the civil side, and prayed that the case be heard and determined by the Trial Judge sitting as trier of the facts.

During a week, or thereabouts, of arduous and extensive examination of the witnesses, both direct and cross, expert and otherwise, the Trial Judge heard the testimony, and, with few exceptions, saw the witnesses

and had an opportunity to observe their demeanor while testifying. Given the opportunity furnished him by Rule 52(a) of the Federal Rules of Civil Procedure to judge the credibility of the witnesses and observe their demeanor, the trier of the facts in this case made the finding that there was no reasonable possibility of rescue and no causal relation between the alleged negligence of the ship and the seaman's death.

The Fourth Circuit Court of Appeals in *Harris v. Pennsylvania Railroad Co.*, 50 Fed. (2d) 866, ruled that the question of reasonable possibility of rescue, as well as the question of causation, was for the trier of the facts. In *Sadler v. Pennsylvania Railroad Co.*, 159 Fed. (2d) 784, it again stated that this was the proper rule of law in such cases. However, after citing *Harris v. Pennsylvania Railroad Company* with approval, in the next breath the Fourth Circuit in the instant case overthrows the findings of the trier of the facts, overwhelmingly supported by the evidence and arbitrarily substitutes its own finding of fact when not supported by the weight of the evidence. Such a manipulation of the fact findings of the trier of the facts, which, at respondent Gardner's election, was the District Court rather than a jury, is a direct invasion by the Fourth Circuit of the function of the trier of the facts so vigorously condemned by this Court in *Gallick v. Baltimore & Ohio Railroad Co.*, supra, not decided and not mentioned in the petition for a writ of certiorari heretofore filed with this Court in this case.

In *Gallick v. Baltimore & Ohio Railroad Co.*, supra, Mr. Justice White, speaking for this Court, said:

"This Court granted certiorari, 369 U. S. 848,

> to consider the questions of whether the decision below improperly invaded the jury's function."

Identical questions for this Court's consideration exist in the instant case. If it was proper to grant certiorari in *Gallick,* where the question was whether the decision below invaded the jury's function, is it not equally proper to grant certiorari in this case where the question at issue is whether the decision below improperly invaded the functions of the Trial Court sitting as trier of the facts at the election of respondent?

In *McAllister v. United States,* (1954) 348 U. S., 19, 75 S.Ct. 6, this Court, at page 8, Supreme Court Reporter, said:

> "***. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C.A., (Citing cases)."

Further in the *Gallick* case Mr. Justice White, speaking for this Court, at page 4183 of The United States LAW WEEK, said:

> "We think that the Court of Appeals improperly invaded the function and province of the jury in this Federal Employers Liability Act case. ***. We hold that the record shows sufficient evidence to warrant the jury's conclusion that petitioner's injuries were caused by the acts or omissions of respondent."

In the *Gardner* case the record, when read, reveals the overpowering testimony of seven of the eight witnesses testifying as to the duty of search and probability of rescue, based on the facts there involved, that had the master of the ship turned back and attempted a search there would have been no reasonable possibility of rescue. The trier of the facts, upon hearing these witnesses testify, concluded therefrom that on the conditions confronting the master of the BULKCRUDE on the night in question, there would have been no reasonable possibility of locating and rescuing Gardner had the ship turned back and attempted a search, and that the action of the master of the BULKCRUDE in promptly notifying the Coast Guard that Gardner was missing, following which the Coast Guard notified all shipping in the area to keep on the lookout for this missing man, was the proper action for the master to take, that he was not negligent in failing to reverse his course for the purpose of conducting a search, and that, in any event, there was no reasonable possibility of success and, hence, there was no causal relation between the negligence, if any, and the death. For these reasons a decree was entered dismissing the libel.

The Fourth Circuit, without expressing an opinion as to why it did not agree with the witnesses testifying both for petitioners and respondent, including the two neutral Coast Guard officers, leading experts on search and rescue, one who testified for petitioners and the other for respondent, in flagrant disregard of the weight of the evidence and the finding below, concluded that there would have been a reasonable possibility of rescue had the master of the BULKCRUDE turned back and attempted a search. Petitioners submit that such action

by the Circuit Court of Appeals was a direct invasion of the functions of the trier of tthe facts and in direct conflict with the views of this Court as just announced in *Gallick v. Baltimore & Ohio Railroad Co.*, supra.

This Court in *Gallick* stresses the importance of having the issue of causation decided by the trier of the facts. In *Gardner,* where such a determination had been made in favor of the shipowner, it should have the same weight as if it had been in favor of the libellant suing as administratrix of an allegedly deceased seaman. Any different holding would be a violation of the shipowners right to due process of law. The right to approval of a jury determination or the determination of a District Court sitting as trier of the facts, is equally as sacred and precious to the shipowner as it is to the seaman or to the railroad worker.

In *Gallick,* at page 4184, LAW WEEK, Mr. Justice White quotes from *Tennant v. Peoria & P.U.R. Co.,* 321 U. S. 29, where this Court granted certiorari "because of important problems as to petitioner's right to a jury determination of the issue of causation," as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate

> conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade,* 135 U. S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co.,* supra, 68; *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. 321 U. S., at 35."

The conclusion of the fact finding body as to negligent causation or any other factual matter, cannot, under the decisions of this Court, be ignored as has been done by the Fourth Circuit in the instant case. The Court of Appeals in *Gardner* has completely usurped the functions of the fact-finding body. Such action constitutes a flagrant violation of the views of this Court as just expressed in *Gallick*. The Fourth Circuit in *Gardner* has charged petitioners with relying on certain deductions which in reality were never relied on, apparently because the majority of its members had not studied the record. Unless certiorari is granted and petitioners are given an opportunity to point out these errors to this Court, such errors, like those appearing in the first opinion of the Fourth Circuit in this case, which that Court later ordered stricken from the reported decisions, will never be passed upon by this Court.

In *Gallick* this Court cites numerous decisions reversing Courts of Appeals when such courts have re-

versed a jury decision in favor of a plaintiff or libellant. The reasoning behind such reversals, if justice is to prevail, must apply with the same force and effect to cases in which Courts of Appeals have reversed the decisions of the fact finder in favor of the defendant or respondent. This Court has repeatedly stated that issues of fact and issues of causation are for the trier of the facts. If such be true, then the determination thereof in favor of a shipowner must be given the same weight as were it in favor of a seaman. Anything different constitutes a flagrant violation of due process of law.

If the Court of Appeals can ignore the decision of the trier of the facts and the testimony of the witnesses that support it, as has been done by the Fourth Circuit in the *Gardner* case, the vital functions of the jury or the District Court sitting as trier of the facts in admiralty will have little or no meaning.

If the Court of Appeals can completely disregard the testimony of two outstanding neutral witnesses whose testimony was accepted by the trier of the facts, without so much as mentioning either their names or their testimony, the basic safeguards of our legal system are in jeopardy.

If the Court of Appeals can allege charges of negligence against a defendant or respondent never once argued before the trier of the facts, an obvious usurpation of that body's vital function has taken place.

To one familiar with the record, it is obvious that the Court of Appeals in utter disregard of the testimony and of the findings of the District Court as trier of the facts reached its own conclusion that liability should be imposed on petitioners. In so doing, the Fourth Circuit

in its first opinion went so far as to accuse the master of the BULKCRUDE of failing to correct an obviously correct Coast Guard message. This unjust accusation of negligence was further accentuated by the Fourth Circuit in its allegations that petitioners relied on several premises for their defense, which allegations were not only wholly incorrect but indeed the premises on which they were based never existed. It is understandable how a Court of Appeals might misinterpret testimony but it is not understandable how that same Court could condemn a respondent for allegedly advancing a defense based on a premise which so far as this case is concerned never has or never will exist.

If this Court's decision in *Gallick* is to be applied to plaintiffs and defendants alike, this Court must grant petitioners' request for certiorari. Only in this manner will petitioners be given an opportunity to point out why the testimony in this case so overwhelmingly supports the decision of the District Court as the fact-finder, and also point out other errors which have been committed by the Fourth Circuit in the *Gardner* case.

Petitioners are fully aware that this Court does not have the time to review the record of all cases in which certiorari is sought, but there comes a time that only by a study of the record can justice be done. Unless certiorari is granted in this case this Court will never have the opportunity to review the record or have the errors of the Circuit Court of Appeals fully explained. As in *Gallick*, this Court should grant certiorari to consider the question of whether the decision below improperly invaded the fact-finder's functions.

The decision in this case will affect shipping and seamen the nation over and is by no means limited to just the litigants here involved. Indeed other shipping interests have already indicated a desire to file briefs as amicus curiae if so allowed.

We believe that this Court should grant certiorari in order that it may thereby consider the usurpation by the Fourth Circuit in this case of the basic functions of the trier of the facts and allow petitioners to point out where the weight of the testimony lies and what caused the District Court as fact-finder to reach the conclusion it did reach. It is, we submit, obvious that the Fourth Circuit, beginning with its first and now discarded opinion, either has not fully familiarized itself with the testimony or has deliberately refused to be bound by the weight of the evidence which, pursuant to the conclusion of this Court in the *Gallick* case, constituted an improper invasion of the fact-finder's functions.

Unless a writ of certiorari is granted to review the decision of the Fourth Circuit, the many misconceptions and errors committed by that Court will never be brought to light or errors prejudicial to petitioners corrected.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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